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Supreme Court of the United States

October Term, 1950

No. 215

THE VALIER COMPANY, a Montana Corporation,
Petitioner,

vs.

THE STATE OF MONTANA, CAREY LAND ACT BOARD, comprised of Sam C. Ford, Governor; Sam W. Mitchell, Secretary of State; R. V. Bottomly, Attorney General; and PONDERA COUNTY CANAL AND RESERVOIR COMPANY, a Montana Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA
and
BRIEF IN SUPPORT THEREOF

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THOMAS'S HELENA

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.
SUMMARY AND STATEMENT OF THE MATTER INVOLVED

The Supreme Court of Montana has interpreted an Act of Congress known as the Carey Act. Then it has stated

that the Montana legislature must have had this same interpretation in mind when it enacted certain statutes implementing the Act in that state and creating a lien authorized by an amendment to the Act. Finally, it has declared that the entire Carey Act (as amended), and all of the associated Montana statutes, are part and parcel of certain contracts between the State of Montana and petitioner's predecessors, and of certain conveyances of land to settlers, by that state, just as if they were written out in full therein. The Court's interpretation of the Carey Act, plus its construction of the Montana statutes, then produce results which deprive your petitioner of rights and privileges conferred by the Carey Act (as amended), and contravene petitioner's Constitutional rights.

Immediately affected are petitioner's rights to around 20,000 acres of irrigated "Carey Act" land located in Pondera County, Montana, and appurtenant water rights. All of this land was originally granted by the United States to the State of Montana under the Carey Act (Act Aug. 18, 1894, c. 301, Sec. 4, 28 Stat. 422; Act March 3, 1901, c. 853, Sec. 3, 31 Stat. 1188; Act Jan. 6, 1921, c. 10, 41 Stat. 1085; now Sec. 641, Title 43, U. S. C. A. And Act June 11, 1896, c. 420, Sec. 1, 29 Stat. 434; now Sec. 642, Title 43, U. S. C. A.; see Appendix "A"). In turn, the State of Montana patented it to settlers, as prescribed by the Carey Act. Your petitioner's predecessor companies had no interest in these lands (other than their Carey Act liens) until they acquired title through foreclosures, or by deeds given in lieu of foreclosures.

Less immediately, but also affected, are the titles to an undetermined number of acres of Carey-Act land in Montana

and in other arid states. Wherever a foreclosure of a Carey-Act lien, or a deed in lieu of such foreclosure, is in a chain of title, both practical and technical difficulties will arise, if this Montana decision is allowed to prevail.

Petitioner, like its several predecessors, is a "Carey-Act construction company." The earlier companies contracted with the State of Montana to build an irrigation system to reclaim the Carey-Act lands which the United States granted to Montana, and to procure settlement on those lands. They also agreed to transfer, to an "operating company," title to the works and to the sources of water supply. The "construction company," in a Carey-Act set-up, sells to settlers shares of stock in the "operating company," and retains the proceeds. The shares represent membership in the "operating company," proportionate interest in its property, and entitle the holder to receive a stated amount of irrigation water from the system, each irrigation season. In turn, the settler must pay a yearly maintenance charge fixed by the "operating company," whether he uses the water or not. Both by contract and statute, in the present case, the stock is made inseparably appurtenant to a particular tract of land described on the face of the certificate. If the stock is not paid for in full at the time of purchase, the settler endorses the certificate in blank and delivers it to the "construction company" by way of security. In the present instance, each settler gave the "construction company" the right to vote the stock, as his proxy, until 35% of the purchase-price should be paid. (R. 27.)

The price of the "water-stock", as contemplated by the amendment to the Carey Act, is fixed, in the contract between

the "construction company" and the state, at a level sufficient to recover construction costs and expenses, plus a reasonable profit. That profit, in turn, amounts to reasonable interest on the investment, over a specified period of time.

On June 11, 1896 (see Act June 11, 1896, c. 420, Sec. 1, 29 Stat. 434; now Sec. 642, Title 43, U. S. C. A.), Congress amended the Carey Act, saying:

> "A lien or liens is hereby authorized to be created by the state to which such lands are granted and by no other authority whatever, and when created shall be valid on or against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

That this amendment grew out of practical necessity, is shown by the debates in the United States House of Representatives, and is admitted by the Montana Supreme Court. (R. 115.)

The State of Montana patented all the Carey Lands (here involved) direct to settlers which petitioner's predecessors procured. The Carey Act imposed on the state, and on nobody else, the duty to sell the land in tracts of 160 acres or less, to any one person, and adjured the state alone to see to it that such lands were occupied and cultivated by actual settlers. By Section 1980, R. C. M. 1935, now Sec. 81-2115, R. C. M. 1947 (see Appendix "B"), and Rule 8 of Montana's Carey Land Act Board (R. 152), an entryman received only a "Certificate of Location," at the outset, and got a patent to the Carey land only after he had proved actual

settlement and cultivation to the Board. At no place in the Carey Act itself, or in any of the Montana statutes associated with it, or in any of the contracts between the State of Montana and the various predecessor "construction companies" of petitioner, is any express direction given to a "construction company" to sell Carey lands to any class or classes of persons, at any price or prices, or in any maximum area or amount.

Section 1976, R. C. M. 1935, now Section 81-2111, R. C. M. 1947 (see Appendix "B"), and the 1909 and 1912 "construction contracts" with the State of Montana (R. 45, 61-62) make it clear that without permission from the Carey Land Act Board of that state, The Valier Company (your petitioner) cannot transfer title to the irrigation-system (even if completed, approved, and accepted), to Pondera County Canal and Reservoir Company (the "operating company"), unless and until 90% of the total number of shares of "water-stock" shall have been sold to settlers and paid for in full by them. In the meantime, Section 1976, now Sec. 81-2111, R. C. M. 1947, (see Appendix "B"), compels the "construction company" to furnish 1½ acre feet of water, per acre, to the holders of "water-stock," each irrigation-season, for a maximum charge of $1.00 per acre. (One and one-half acre feet is the amount per acre called for in the construction contracts (R. 25) and the figure later set out in the "water-stock" certificate.) It is important to petitioner, or to any Carey-Act "construction company" similarly situated, to know whether it can count, toward the achievement of the "90% level," shares of "water-stock" which its predecessor companies acquired by foreclosing Carey-Act

liens or by accepting deeds in lieu of such foreclosures from defaulting settlers. If deeded or foreclosed shares cannot be so counted, and settlers successively default, sale of 90% of the shares may never be accomplished, or may require an inordinate length of time.

The statutes which the Montana legislature enacted to create the Carey-Act lien, and to place the state in a position to receive the advantages of the Federal Act, are Secs. 1966 to 1995, R. C. M. 1935; now 81-2101 to 81-2130, R. C. M. 1947. Sec. 1983, R. C. M. 1935, now Sec. 81-2118, R. C. M. 1947, gives a "construction company" a security lien for unpaid balances due on "water-stock" purchases against both the land and the appurtenant stock.

Petitioner contends that a "construction company" which forecloses such a lien or receives delivery of a deed in lieu of such foreclosure from a defaulting settler, receives an unqualified fee-simple title to the Carey land and appurtenant "water-stock," free from any obligations as to their further sale and conveyance; also, that any balance due on shares so acquired has been paid for, in full, in land, by the defaulting settler; and that such shares may therefore be counted toward attainment of the "90% level." The trial Court so held. (R. 95 to 103.)

On appeal, the Supreme Court of Montana reversed the trial Court on both points, basing its decision on grounds which were not supported by evidence and which no party to the action had submitted or urged. (R. 141- 142.) Said Court also asserted that the two cases upon which petitioner had most heavily relied were not in point. (R. 118.) Mr.

Associat Justice Angstman, in a dissenting opinion (R. 138) upholding all of petitioner's views, declared that these two decisions *(North Side Canal Company, Limited, v. Idaho Farms Company* (1939), 60 Idaho 748, 96 Pac. 2d. 232, and the related case bearing the same name, in the C. C. A., 9th Circuit, reported in 107 F. 2d. 481), were squarely in point. He also cited the later case of *In re Robinson (Wendell Highway District No. 16, et al., Interveners)* (1940), 61 Idaho 462, 103 Pac. 2d. 693, as settling all doubts as to their relevancy.

The patent from the United States to the State of Montana (R. 105, 106) and the patent from the State of Montana to a settler (R. 107, 108) convey a fee-simple title which a settler later can convey to a neighbor who already has his 160 acres of Carey land. But here we have this extraordinary result: a creditor "construction company," which has a lien on a fee-simple title owned by its debtor, receives, on foreclosure, a title of lower quality; because restraints on alienation are applied to it, in the creditor's hands. A true lien, on foreclosure, gives a creditor at least as good a title as his debtor has; and the disfavor with which the law regards restraints on alienation is many centuries old.

The Carey Act of Congress authorized states to create true liens only, and did not contemplate restraints on alienation applicable to any person or persons other than the states. The State of Montana executed its trust, as to each piece of Carey land, as soon as it patented that land to an actual settler who had proved his eligibility. The "construction company" fulfilled its duty to procure settlement, on any given piece of Carey land, as soon as it procured a settler

who could (and did) prove his eligibility. It never contracted to reprocure such settlement over and over again.

In addition, if the "construction contracts" with the State of Montana include (by reference or necessary operation of law) all of the terms and conditions of the Carey Act, as the Supreme Court of Montana asserts, then the "construction company" has a contractual right to a true lien.

If the Montana decision is upheld, petitioner loses rights which the Carey Act of Congress meant it to have; and petitioner's contract rights are impaired in violation of the Constitution of the United States.

The Montana statute creating the Carey lien, and providing for its foreclosure, is almost exactly like the corresponding Idaho statute, which was construed by the Supreme Court of Idaho in a manner favorable to the position which petitioner here asserts. The words of the Montana statute are proper, but its interpretation is improper.

B.
BASIS OF JURISDICTION

1. The decision of the Supreme Court of the State of Montana was rendered January 10, 1950 (R. 109), and was made final by the denial of petitioner's Petition for Rehearing, and Remittitur to the trial Court, on March 29, 1950 (R. 225, 226); and it is this final judgment which petitioner seeks to have reviewed. The Supreme Court of the State of Montana is the highest court, and court of last resort, in said state (Sections 2 and 3, Article VIII, Constitution of Montana).

2. A Federal question regarding an interpretation of a Federal statute first appeared in the Opinion of the Supreme Court of Montana, rendered Jan. 10, 1950, where references to the Carey Act (of Congress) were made. The most pertinent of these references were as follows:

> "From the provisions of the Federal and State laws hereinabove quoted or referred to and said contracts executed pursuant thereto, it is manifest that it was the policy and intention of the Congress and of the Montana legislature that such Carey Act lands should be finally acquired only by actual settlers thereon in separate tracts of not to exceed 160 acres to each qualified settler.
>
> "The amendment of the Federal Act on June 11, 1896 (43 U. S. C. A., Sec. 642, quoted above), contains nothing to show a new or different policy or intention.
>
> "3 Kinney on Irrigation and Water Rights (2d Ed.) in section 1323 discusses the purposes of this amendment. There it is said: 'One object of the amendment was that it had been ascertained that the states named in the Act, and which were expected to take advantage of the same, either had not the means or were prohibited by their constitutions from lending their credit to the construction of the large canals and irrigation works necessary to reclaim large tracts of land; and that it was necessary to make some provision by which persons or corporations having ample means and acting for the States in the construction of these works, should be made secure by a lien or liens on the lands and water rights for the large sums of money necessarily advanced by them'.
>
> "Kinney also mentions that in the discussion of said amendment in Congress, it was 'pointed out that this

amendment, in the form in which it finally passed, would necessarily result in the acquisition by wealthy individuals and corporations of large bodies of land, to the exclusion of the settler. The result was practically, conceded by the friends of the measure.'

"Plaintiff is here seeking to have this amendment so construed." (R. 123, 124.)

"It is manifest from the provisions of the Montana law, enacted in 1905, accepting the provisions of the Carey Law and amendment thereof of June 11, 1896, and especially those found in sections 1976, 1980 and 1983, R. C. M. 1935, that the Montana legislature did not construe said amendment to the Federal Act as giving a lien holder, by foreclosure thereof or by deed in lieu of foreclosure, a right to acquire an unlimited title with unrestricted rights and powers to handle the lands embraced within a Carey Land Act project.

"Section 642 of the Federal Act authorizes the state to create a lien on such lands, which will be valid thereon 'until disposed of to actual settlers.' " (R. 124, 125.)

"The construction company at this point in the development of the project, says it is now the owner of these lands and water and therefore it has complied with the statutes in such case provided, has met its contract obligation as to the '90% level,' and may now sell to anyone in unlimited amounts, or all to one, or retain it as it desires. To sustain such contention would be to completely disregard the intent of the Act, the meaning of the special Montana lien statute, the contractual obligation of the construction company and would be tantamount to a rejection of the principles and purposes of the project." (R. 133.)

The opinion is replete with other statements demonstrating that the Montana Court found the Federal Act to be controlling.

In the last excerpt quoted above the Supreme Court of Montana not only construed the amendment to the Federal Act, but also placed its own construction thereof in the mouth of the Montana legislature. The meaning of the Montana statute was made to depend on the interpretation of the amendment to the Act of Congress. The interpretation of the Carey Act also "follows through" into the Court's interpretation of the patents to the settlers, issued under the authority of the United States, and into the Court's interpretation of the contract between the State of Montana and the predecessor "construction companies."

Your petitioner, in its Petition for Rehearing, filed Feb. 10, 1950, urged that the Court's interpretation of the Carey Act was strained and unwarranted. (R. 140-220.) This was the first opportunity petitioner had to deal with an interpretation of the Federal Carey Act, and this Court has jurisdiction of the Federal questions under the authority of *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U. S. 358, 366-367, 77 L. Ed. 360, 367-368, 53 S. Ct. 145 (Dec. 1932).

The Opinion of the Supreme Court of Montana alludes to the amendment to the Carey Act as an enabling act only, but the Court has construed it as being more than an enabling act. By suggesting local issues as the basis of its decision, when in fact the decision is bottomed on an interpretation of an Act of Congress, the Montana Supreme Court cannot preclude the jurisdiction of the United States Supreme Court.

Creswell v. Grand Lodge K. of P., 225 U. S. 246, 261, 56 L. Ed. 1074, 1080-1081, 32 S. Ct. 822 (June, 1912).

Chapman v. Goodnow's Adm'r, 123 U. S. 540, 548, 31 L. Ed. 235, 238, 8 S. Ct. 211 (Dec., 1887).

Rogers v. Alabama, 192 U. S. 226, 231, 48 L. Ed. 417, 419, 24 S. Ct. 257 (Jan., 1904).

If it be contended that the decision of the Montana Supreme Court is based upon state statutes dealing with "Carey" projects, as well as upon the Federal Act, the jurisdiction of this Court should be invoked on the theory that the non-federal question is so interwoven with the federal question, that the local ground alone cannot sustain the decision.

Enterprise Irrig. District v. Farmers Mut. Canal Co., 243 U. S. 157, 164, 61 L. Ed. 644, 648-649, 37 S. Ct. 318 (Mar., 1917).

Whether or not the decision was based upon Federal grounds, is (itself) a question which should be determined by this Court.

Abie State Bank v. Bryan, 282 U. S. 765, 773, 75 L. Ed. 690, 701, 51 S. Ct. 252 (Feb., 1931).

3. Jurisdiction is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, now Section 1257, Title 28, U. S. C. A., Sub-section (3), on the following bases:

(a) The statute of the United States under which a right, title or privilege is specially set up or claimed, is Section 4 of the Act of August 18, 1894, c. 301, 28 Stat. 422; as amended by Act of March 3, 1921, c. 853, Sec. 3, 31 Stat. 1188, and by the Act of Jan. 6, 1921,

c. 10, 41 Stat. 1085; (now Sec. 641, Title 43, U. S. C. A.); and particularly as amended by the Act of June 11, 1896, c. 420, Sec. 1, 29 Stat. 434; (now Sec. 642, Title 43, U. S. C. A.). Petitioner's Amended Complaint, in the trial Court, specifically alleged that the lands to which petitioner claimed title were Carey-Act lands. Therefore, whatever right, title or privilege petitioner had to these lands, was set up by, and claimed under, the statute of the United States above referred to, and found in Appendix "A" to this present Petition.

St. Louis I. M. & S. Co. v. Taylor, 210 U. S. 281, 292, 52 L. Ed. 1061, 1067, 28 S. Ct. 616 (May, 1908).

(b) Section 1983 of the Revised Codes of Montana 1935, as here interpreted by the Supreme Court of the State of Montana, is repugnant to the amendment embodied in the Act of June 11, 1896, c. 420, Sec. 1, 29 Stat. 434 (now Sec. 642, Title 43, U. S. C. A.). The Federal statute here referred to provides that a state, acting under the Carey Act, may create "a lien or liens * * * [which] shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation." Pursuant to the authority granted in this Federal statute, the legislature of the State of Montana enacted the above-referred-to state statute. But under the Opinion of the Montana Supreme Court in this present controversy, a "construction company" which forecloses its "Carey-Act lien" under the Montana statute, and which retains the property after all rights of redemption have expired, receives a title considerably inferior to the fee-simple title which its debtor possessed before the foreclosure. Therefore, the so-called lien created by Montana is not a lien at all; and the Montana statute

is repugnant to the Federal statute because the latter contemplates the creation of a true lien only.

(c) Section 1983, R. C. M. 1935, now Section 81-2118, R. C. M. 1947, (see Appendix "B"), as here interpreted by the Supreme Court of the State of Montana, impairs the obligation of the contract between predecessors of petitioner and the State of Montana, in violation of Section 10 of Article I of the Constitution of the United States. As stated by the Supreme Court of Montana in its Opinion (R. 121):

> "Under the rule for construction of contracts, hereinbefore stated, the provisions of said sections 641 and 642 of 43 U. S. C. A. and of sections 1976, 1980 and 1983, R. C. M. 1935, enter into and form a part of the contracts between the Carey Land Act Board and the predecessor companies of the plaintiff and are binding on the plaintiff."

The 1896 amendment to the Carey Act (Act of June 11, 1896, c. 420, Sec. 1, 29 Stat. 434; now Sec. 642, Title 43, U. S. C. A.) is specifically included in the construction contracts between the State of Montana and petitioner's predecessor "construction companies," according to the Montana Supreme Court. That Federal statute declares that the state may create a lien or liens. It further provides that these liens shall be "valid." There is no provision (in this or in any other Federal enactment concerning Carey-Act lands) for the creation of anything less than a lien. This decision of the Supreme Court of Montana holds that by foreclosing the so-called lien created by Sec. 1983, R. C. M. 1935, now Section 81-2118, R. C. M. 1947, (created under the Federal authorization), the "construction company" acquires something less than the title which the default-

ing settler possessed before foreclosure, even if all redemption rights have expired. The Montana statute (as thus interpreted) has created something less than a true lien; and, as so interpreted, it deprives petitioner of its contract right to a true lien. Therefore, there is an impairment of the obligation of contract, which violates Article I, Section 10, of the Constitution of the United States, above referred to.

Douglass v. Pike County, 101 U. S. 677, 687, 25 L. Ed. 968, 971 (Mar., 1880).

(d) Petitioner further contends that the decision of the Supreme Court of Montana (in this case) deprived petitioner of property without due process of law, and was therefore a violation of the Fourteenth Amendment to the Constitution of the United States. The Petition for Rehearing pointed out that the conclusions of the Supreme Court of Montana lacked foundation (either in the Acts of Congress or in the statutes of Montana) (R. 161, 179); that the Opinion was bereft of consistent legal theories to support it (R. 159-189); that as to the nature of the sale of the "water-stock" to a settler, the Opinion contravened a prior decision of the Montana Supreme Court (R. 201 to 204); that regarding the effects of foreclosure or the acceptance of deeds in lieu, the decision was contrary to the *North Side Canal Company* cases in the Supreme Court of Idaho and in the Circuit Court of Appeals, Ninth Circuit (R. 195 to 200); that the Opinion was based on false assumptions, contrary to the facts contained in the record (R. 141 to 149); that the decision turned upon questions injected into the case by the Montana Supreme Court itself, which none of the parties to the litigation had urged (R. 141, 142); that the decision introduced (without settling) a multitude of questions, with the result that

titles to Carey-Act lands were further impaired (R. 220). For these reasons petitioner alleges that the Opinion is arbitrary and capricious; and that it violated the "due process clause" of the Fourteenth Amendment to the Constitution of the United States.

Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, 484-485, 60 L. Ed. 392, 396, 36 S. Ct. 204 (Jan., 1916).

Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U. S. 226, 233-234, 41 L. Ed. 979, 983-984, 17 S. Ct. 581 (Mar., 1897).

Yick Wo v. Hopkins, 118 U. S. 356, 373-374, 30 L. Ed. 220, 227, 6 S. Ct. 1064 (May, 1886).

(e) The Federal statute intended that the state should create a true lien on the separate subdivisions of the Carey-Act land reclaimed. This lien was to protect the "construction company's" costs and profits, if a settler defaulted; and the price of the stock was fixed (by the state and the company, in the "construction contract") at a level sufficient to equal those costs and profits. Where a state permits no deficiency judgment to be entered against a defaulting settler, as in Idaho and Montana, and the "water-stock" itself is made 'inseparably appurtenant" to the land (both by contract and state statute), a necessary result of foreclosure is *payment in full, by the settler, for the "water-stock," in property.* This is true, because under no other theory could the costs and profits be said to be truly secured. Thus the state lien-and-foreclosure statute, as here interpreted by the Montana Supreme Court, is repugnant to the Carey Act. The attention of the Supreme Court of Montana was directed to this conflict in the state

statute, as interpreted by it, and the Federal statute, in the Petition for Rehearing. (R. 218, 219.)

4. The questions as to the nature of the title to Carey-Act lands are substantial and far-reaching. Not only are the titles to petitioner's lands (aggregating approximately 20,000 acres) involved, but also affected are the titles to untold thousands of acres of Carey-Act lands throughout the western states of Montana, Colorado, Idaho, Nevada, Oregon, Washington and Wyoming, where titles acquired by Carey-Act "construction companies" by foreclosure or deeds in lieu thereof and then sold to other persons will be clouded and thrown into a state of confusion, if the decision of the Montana Supreme Court is allowed to stand. Many tracts of lands on other Carey projects in Montana, and in other states, follow a chain of title parallel to that here involved; and they have been freely conveyed, without regard to the restrictions and limitations imposed by the decision of the Supreme Court of Montana.

The Federal Carey Act set up the machinery for reclaiming Federal arid lands, and set up a method for financing such reclamation. The grant of the Federal government to the state was conditioned upon a complete reclamation; and the accomplishment of the reclamation of the lands here in question had to be recognized by the Federal authority. For a branch of a state government, at this late date, to unsettle titles which have been acquired through the functioning of the machinery provided by the Federal Act, is entirely inconsistent with anything ever contemplated by the Congress of the United States.

C.
QUESTIONS PRESENTED

1. Must petitioner sell its Carey-Act lands and appurtenant "water-stock", acquired by its predecessor "construction companies" through foreclosures or deeds in lieu, to a limited class of purchasers; and sell the land at the same prices at which the State of Montana sold it in its unimproved condition; and sell the stock at the prices fixed in the construction contracts between the State of Montana and the earlier "construction companies"; and sell said lands in tracts of 160 acres or less to any one buyer? Or may petitioner dispose of these items of property in any manner and at any prices it may see fit, just as any other purchaser at foreclosure sale when rights to redeem have expired?

2. Was the original sale of "water-stock", to a settler, a merely conditional sale, where title was retained for security purposes and his equitable rights were subject to forfeiture if he failed to pay for the stock? (This concept ignores the purposes of the Carey Act passed by Congress.) Or was this sale a final one, passing title immediately to the settler? (An earlier Montana case, not here expressly overruled, so holds.)

3. Did foreclosure, or acceptance of deed in lieu of foreclosure, constitute payment in full for the "water-stock" by the defaulting settler?

D.
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Supreme Court of Montana has decided Federal questions of substance not heretofore determined by this Court, and has decided them in a way probably not in accord with applicable decisions of this Court.

2. The highest court of the State of Idaho, and the United States Court of Appeals, Ninth Circuit, have reached a different conclusion from the Supreme Court of the State of Montana, to-wit: that a Carey Act construction company holds a free and unrestricted title to Carey Act lands and appurtenant water rights acquired by it through foreclosures. (*North Side Canal Company, Ltd., v. Idaho Farms Co.*, 60 Idaho 748, 96 Pac. (2d) 232; *North Side Canal Co., Ltd., v. Idaho Farms Co.*, 1939, C. C. A., 9th Circuit, 107 Fed. (2d) 481.)

3. The titles to untold thousands of acres of Carey Act lands (and appurtenant water rights) throughout the western states of Montana, Colorado, Idaho, Nevada, Oregon, Washington, and Wyoming will be clouded and thrown into a state of cofusion, if the decision is allowed to prevail, wherever the "construction company" appears in a chain of title.

4. The Supreme Court of Montana has based its decision (in this case) upon assumptions of fact and upon issues of law which are absent from the record and the pleadings; thereby denying to petitioner its right to notice and its right to be heard. It has arbitrarily and capriciously disregarded

the rules of appellate review, all concepts of statutory construction, all rules of the law of contracts, and has ignored its own prior decisions; and therefore it has deprived petitioner of valuable property rights in a manner amounting to confiscation, as forbidden by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of Montana has encroached upon the legislative prerogative; and, by so doing, has impaired the obligations of petitioner's contracts with the State of Montana, in violation of Section 10, Article I of the Constitution of the United States.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, to the Supreme Court of the State of Montana, to the end that the judgment of the Supreme Court of the State of Montana may be reviewed by this Honorable Court.

THE VALIER COMPANY
Petitioner

FORREST H. ANDERSON
Counsel for Petitioner
Helena, Montana

SUMNER B. YOUNG
L. V. HARRIS
Of Counsel for Petitioner.

Supreme Court of the United States

October Term, 1950

No._____

THE VALIER COMPANY, a Montana Corporation,
Petitioner,

vs.

THE STATE OF MONTANA, CAREY LAND ACT BOARD, comprised of Sam C. Ford, Governor; Sam W. Mitchell, Secretary of State; R. V. Bottomly, Attorney General; and PONDERA COUNTY CANAL AND RESERVOIR COMPANY, a Montana Corporation,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
OPINIONS OF THE COURT BELOW

No opinion of the trial court was rendered or reported. The decree of the trial court, the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Pondera, appears at pages 95 to 103 of the record.

The opinion of the Supreme Court of the State of Montana has not yet been officially reported. The decision and opinion of the Supreme Court of the State of Montana which peti-

tioner seeks to have reviewed appears at pages 109 to 140 of the record. It is also found at 215 P. (2d) 966, and in Vol. 3 Montana State Reporter 27 (mimeographed).

II.
JURISDICTION

Petitioner adopts the "Statement of Grounds of Jurisdiction" in the Petition for Writ of Certiorari for showing the grounds upon which the jurisdiction of this Court is invoked.

III.
STATEMENT OF THE CASE

Petitioner adopts the Summary Statement of the Matter Involved in the Petition for Writ of Certiorari as a statement of the case for the purpose of this brief.

IV.
SPECIFICATIONS OF ERROR

The Supreme Court of the State of Montana erred:

1. In construing and holding the Federal Carey Act, as amended (Section 4 of the Act of August 18, 1894, as amended by the Act of June 11, 1896, now Sections 641 and 642, Title 43, U. S. C. A.) to require petitioner to sell its Carey-Act lands and appurtenant water stock to a limited class of purchasers, at fixed prices, in tracts of 160 acres or less to any one buyer.

2. In construing and holding said Federal Carey Act, as amended, to prohibit petitioner from counting sales of water stock appurtenant to Carey-Act lands, acquired by petitioner through foreclosure and deeds in lieu of foreclosure toward the achievement of the sale of 90% of all

authorized water stock under petitioner's contracts with the State of Montana.

3. In denying petitioner's rights and title in real property claimed and set up under the authority of the United States through patents from the United States.

4. In construing and administering Section 1983, Revised Codes of Montana, 1935 (Section 81-2118, Revised Codes of Montana, 1947) and Section 1976, Revised Codes of Montana, 1935 (Section 81-2111, Revised Codes of Montana, 1947) in a manner repugnant to said Federal Carey Act.

5. In construing and administering Section 1983, Revised Codes of Montana, 1935 (Section 81-2118, Revised Codes of Montana, 1947) in such an arbitrary, discriminatory, capricious and oppressive manner as to deprive petitioner of its property without due process of law and to deny petitioner the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. In encroaching upon the legislative function of the Congress of the United States and the Legislature of the State of Montana so as to impair the obligations of petitioner's contracts with the State of Montana in violation of Section 10, Article I of the Constitution of the United States.

V.

ARGUMENT

SUMMARY OF THE ARGUMENT

1. The Supreme Court of Montana misconstrued the Federal Carey Act, Sections 641 and 642 of Title 43, U. S.

C. A., by going beyond the intended scope and meaning of the Act and interpreting it in a manner never heretofore contemplated.

2. The Supreme Court of Montana denied petitioner's rights to a fee simple title to lands set up and claimed under a federal authority evidenced by federal patents.

3. The Supreme Court of Montana construed state statutes in a manner repugnant to a Federal Act.

4. The decision of the Supreme Court of Montana administers state statutes in an arbitrary, discriminatory, capricious, and oppressive manner in violation of the due process and equal protection clauses of the Constitution of the United States, and encroaches upon the legislative function to an extent impairing the obligations of contract in violation of Section 10, Article I of the Constitution of the United States.

FEDERAL QUESTION DECIDED BY MONTANA SUPREME COURT NOT PREVIOUSLY DETERMINED BY THIS COURT

The facts, as more fully stated in the Petition, are that petitioner is a construction company under a typical federal Carey Land Act project; that petitioner, through its predecessors, acquired a fee simple title to approximately 20,000 acres of irrigated land by foreclosure (or deeds in lieu of foreclosure) of liens against Carey-Act lands; and that the Supreme Court of Montana has imposed restrictions upon petitioner which abrogate petitioner's fee simple title.

As stated in the Petition, the Supreme Court of the State of Montana based its decision upon its construction of the Federal Carey Act as amended (Section 4 of the Act of August 18, 1894, as amended by the Act of June 11, 1896, now Sections 641 and 642, Title 43, U. S. C. A. See Appendix "A" to Petition).

The Montana Supreme Court apparently sought to foreclose the jurisdiction of this Court by referring to the Carey Act as an enabling act only. This, however, does not preclude the jurisdiction of this Court.

> *Montana ex rel. Haire v. Rice,* 204 U. S. 291, 299, 51 L. Ed. 490, 494-495, 27 S. Ct. 281 (Jan., 1907).

It is submitted that the Federal Act should be limited in its scope, but it must be recognized that the Montana Supreme Court did not so limit the scope of the Federal Act. Rather, the Montana Supreme Court based its decision upon a strained construction of the Federal Act. It seized upon certain magic words, "until disposed of to actual settlers" in the Federal Act and rested its decision thereon. (R. 115, 116.)

In setting out and emphasizing specific language of the Federal Act (R. 115), in discussing the Congressional intent (R. 115, 116), and in referring to textbooks on the Federal Act (R. 115, 116), the Montana Supreme Court clearly showed that its decision was based upon its interpretation of the Federal Act, as amended. Where the final decision of the highest court of a state rests on its interpretation of a Federal statute, such decision is reviewable on writ of certiorari to the United States Supreme Court.

Longest v. Langford, 274 U. S. 499, 71 L. Ed. 1170, 47 S. Ct. 668 (May, 1927).

Straus v. American Publishers' Association, 231 U. S. 222, 58 L. Ed. 192, 34 S. Ct. 84 (Dec., 1913).

Whether or not the decision was based upon a federal question should be determined by the Supreme Court of the United States.

First National Bank v. Anderson, 269 U. S. 341, 70 L. Ed. 295, 46 S. Ct. 135 (Jan., 1926).

Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 667, 82 L. Ed. 685, 1123, 58 S. Ct. 443, 755 (Jan., Feb., 1938).

State Tax Commission v. Van Cott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605 (Mar., 1939).

Substantially the same facts and statutes were involved in the case of *North Side Canal Co., Ltd., v. Idaho Farms Co.,* 60 Idaho 748, 96 Pac. (2d) 232, and the Idaho Supreme Court reached conclusions diametrically opposed to those of the Supreme Court of Montana.

The Circuit Court of Appeals of the Ninth Circuit considered the Idaho Supreme Court's decision as being based upon local grounds, and a reading of the opinion of the Idaho Supreme Court reveals that the Idaho court did find the basis for its decision in the state statutes, rather than in the Federal Carey Act. In this respect, the decision of the Idaho court is clearly distinguishable from that of the Montana Supreme Court in the instant case. As has been shown, the Montana Supreme Court has not restricted the meaning of the Federal Act, but has broadly interpreted it as supplying the basis for its conclusions, particularly in the

emphasis which it has placed upon the words "until disposed of to actual settlers" found in the amendment to the Federal Act. (R. 115, 116).

The question involved has not been previously presented to this Court. This Court did, however, uphold the priority and validity of a construction company's Carey-Act lien in *Portneuf-Marsh Valley Canal Company v. Brown,* 274 U. S. 630, 639, 71 L. Ed. 1243, 1270, 47 S. Ct. 692 (May, 1927), where it was said of the statutory provision for such a lien by Mr. Justice Stone:

> "Its primary object was to secure the requisite capital for the creation of costly irrigation systems by which arid public lands could be brought under cultivation. It could not have been contemplated that the 'first and prior' liens authorized by the statute to secure the repayment of such capital should be subsequent to every other lien which might be placed upon the property except those formally executed by the landowners or that a 'first lien' of that character would attract capital into a new and hazardous enterprise. * * *"

The foregoing decision of this Court recognized the principle that a Carey-Act lien to secure the construction costs of building an irrigation system is a lien in the true sense of the word. The Supreme Court of Montana has ignored the principle enunciated by this Court, and has applied the Federal Carey Act in a manner which emasculates the construction company's lien.

The holding that petitioner does not have the ordinary incidents of title after foreclosure of its lien (or after acceptance of a deed in lieu of foreclosure) means that the so-called

lien was never a lien at all. The Supreme Court of Montana has thus misconstrued the Federal Carey Act and has thereby decided a substantial federal question contrary to an applicable decision of this Court.

The foregoing argument that the Montana Supreme Court erred in its interpretation of the lien provision of the Federal Carey Act, as applied to the nature of petitioner's title, is equally applicable to petitioner's contention that the Montana Court erred in finding that petitioner was not entitled to count sales of water stock (made appurtenant to lands acquired through foreclosure or deeds in lieu of foreclosure) toward the accomplishment of the sale of 90% of the authorized water stock under petitioner's contracts with the State of Montana. The lien is applied against the water stock as well as against the land to which the water stock was made appurtenant. If it was, as petitioner contends, a lien in the true and ordinary sense, it was in the nature of a purchase money lien against the water stock. It follows, then, that the transactions by which the water stock was sold were final sales, and petitioner is entitled to have them construed as final sales in the construction of its contracts with the State of Montana.

RIGHT OR TITLE SET UP OR CLAIMED UNDER AUTHORITY OF FEDERAL PATENT

The patent of the Carey Act lands from the United States to the State of Montana gave the State of Montana the "power to convey the same, ***in fee simple*** in accordance with the provisions of the said Acts." (Emphasis supplied.) (R. 106.) The Act of Congress of June 11, 1896 (now Section

642, Title 43, U. S. C. A.) is one of the Acts referred to in the patent and this amendment provides for the lien and states that it "when created shall be valid on and against the separate legal subdivisions of land reclaimed." (See appendix "A" to Petition.) Where a right or title is claimed under a statute of the United States the judgment of the highest court in a state may be reviewed by the United States Supreme Court on a writ of certiorari.

> *Montana ex rel. Haire v. Rice,* 204 U. S. 291, 51 L. Ed. 490, 27 S. Ct. 281 (Jan., 1907).
>
> *Henry Ford & Son, Inc., v. Little Falls Fibre Co.,* 280 U. S. 369, 74 L. Ed. 483, 50 S. Ct. 140 (Jan., 1930).
>
> *Lytle v. State of Arkansas,* 63 U. S. 193, 22 How. 193, 16 L. Ed. 306 (Feb., 1860).

By incorporating the Congressional Acts in the patents by reference, the federal authority, as executed under the Department of Interior, contemplated a lien in the ordinary sense of the word. The federal authority further contemplated conveyances in fee simple according to the established meaning of the term. Courts are bound to construe words according to their accepted meaning.

> *Western Union Teleg. Co. v. Lenroot,* 323 U. S. 490, 506, 89 L. Ed. 414, 425, 65 S. Ct. 335 (Jan., 1945).

The monstrous restrictions which the Supreme Court of Montana imposed upon petitioner's power of alienation are absolutely repugnant to any concept of a fee simple. Such restraints, unsupported by statute or contract, have been unknown to the law since feudal times. By its dogmatic assertion that covenants run with the land and result in

certain restrictions upon petitioner, the Supreme Court of Montana has denied petitioner its fee simple title asserted under the authority of the federal patent.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 54, 46 L. Ed. 800, 22 S. Ct. 563 (April, 1902).

DePeyster v. Mitchell, 6 N. Y. 467 (1852).

STATE STATUTE CONSTRUED IN A MANNER REPUGNANT TO FEDERAL STATUTE

Although the primary basis for the decision of the Supreme Court of Montana is the amendment to the Federal Carey Act, as heretofore pointed out, the Court has attempted to bolster its decision by reference to the Montana statute, Section 1983, Revised Codes of Montana, 1935, Section 81-2118, Revised Codes of Montana, 1947. (See Appendix "B" to Petition.) To whatever extent the decision is grounded upon the state statute, the decision is repugnant to the Federal Carey Act, Sections 641 and 642, Title 43, U. S. C. A.

Where the judgment of a state court based upon its interpretation of a state statute frustrates the intent of a Federal statute, the United States Supreme Court will declare such judgment to be invalid.

Wissner v. Wissner, 338 U. S. 655 (Feb., 1950).

The argument in the preceding paragraphs that the amendment to the Federal Carey Act contemplated a lien in the accepted meaning of the term is applicable here, and any conclusions of the Montana Supreme Court that a lien provided by Montana statutes was not in fact a lien renders the Montana statutes repugnant to the Federal Act.

The intentions of Congress with respect to the lien and its purposes clearly appear in 28 Congressional Record, p. 6222 et seq. See also 3 Kinney on Irrigation and Water rights, Chapter 67, Sec. 1316, p. 2390. The Supreme Court of the State of Montana, however, *expressly disregarded* the Congressional intent, as is shown by its own opinion. (R. 116.)

STATE STATUTE CONSTRUED TO DEPRIVE PETITIONER OF PROPERTY IN VIOLATION OF DUE PROCESS AND EQUAL PROTECTION CLAUSES OF XIVTH AMENDMENT

To whatever extent the decision of the Montana Supreme Court is grounded on the state statute, it administers a state statute in an arbirary, discriminatory, capricious and oppressive manner in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The decision strips petitioner's title to its lands of all the vital attributes of a fee simple title. (R. 130-131, 134.)

The Supreme Court of the State of Montana has administered the state statute in an arbitrary, discriminatory, capricious and oppressive manner in the following respects:

1. In basing its decision on false assumptions of fact and on matters of fact not contained in the record (which were not proper matters for judicial notice), thereby depriving petitioner of its constitutional right to notice and its constitutional right to be heard. (R. 141 to 150.)

Saunders v. Shaw, 244 U. S. 317, 319, 61 L. Ed. 1163, 1165, 37 S. Ct. 638 (June, 1917).

Standard Oil Co. v. Missouri, 224 U. S. 270, 281, 56 L. Ed. 760, 767-768, 32 S. Ct. 406 (April, 1912).

Windsor v. McVeigh, 93 U. S. 274, 282, 23 L. Ed. 914, 917 (Dec., 1876).

2. In ignoring the principles of appellate practice by injecting issues which were not raised by any of the parties litigant, thereby depriving petitioner of its constitutional right to notice and its constitutional right to be heard. (R. 141-142, 212-213.)

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 677, 74 L. Ed. 1107, 1111, 50 S. Ct. 451 (June, 1930).

Reynolds v. Stockton, 140 U. S. 254, 265, 35 L. Ed. 464, 468, 11 S. Ct. 773 (May, 1891).

Coe v. Armour Fertilizer Works, 237 U. S. 413, 426, 59 L. Ed. 1027, 1032, 35 S. Ct. 625 (May, 1915).

3. In concluding that covenants run with the land when no express covenant nor reasonable implication of a covenant is to be found in any contract or statute. (R. 159 to 190.)

Orchard Homes Ditch Co. v. Snavely, 117 Mont. 484, 159 Pac. (2d) 521 (June, 1945).

Sec. 7417, Revised Codes of Montana, 1935 (Sec. 58-305, R. C. M., 1947).

Petitioner, if given an opportunity, can prove that the limitations imposed by the Supreme Court of Montana will result in vast losses, equivalent to a confiscation. "In the absence of contract obligation" a judicial branch of the state

violates the Fourteenth Amendment by compelling an operation at a loss.

Georgia Power Co. v. Decatur, 281 U. S. 505, 508, 74 L. Ed. 999, 1003, 50 S. Ct. 369 (May, 1930).

4. In ignoring the plain and accepted meaning of the word "lien."

Western Union Teleg. Co. v. Lenroot, 323 U. S. 490, 506, 89 L. Ed. 414, 425, 65 S. Ct. 335 (Jan., 1945).

5. In encroaching upon the legislative function in violation of the rules of statutory construction.

Section 10519, Revised Codes of Montana, 1935 (Section 93-401-15, Revised Codes of Montana, 1947).

Morrison v. Farmers' etc. State Bank, 70 Mont. 146, 155, 225 Pac. 123 (Mar., 1924).

6. In ignoring its own prior decisions, to-wit: *Valier-Montana Land & Water Company v. Ries, et al,* 109 Mont. 508, 97 Pac. (2d) 584 (Jan., 1940).

Douglass v. Pike County, 101 U. S. 677, 687, 25 L. Ed. 968, 971 (Mar., 1880).

7. In imposing restrictions on the alienation of property in violation of the laws of real property and all modern concepts of public policy.

De Peyster v. Mitchell, 6 N. Y. 467 (1852).

8. In delegating legislative authority to an administrative board, i.e., The Carey Land Act Board of the State of Montana. (R. 118-119, 134.)

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (Jan., 1935).

9. In discriminating against petitioner by deciding that certain rules apply to petitioner which do not apply to others within the same category. (R. 133.)

Southern Ry. Co. v. Greene, 216 U. S. 400, 417, 54 L. Ed. 536, 30 S. Ct. 287 (Feb., 1910).

10. In appropriating private property to a public use without just compensation. While the state is not subject to the Fifth Amendment, a denial of the safeguards of the first eight Amendments is a denial of due process of law under the Fourteenth Amendment.

Twining v. New Jersey, 211 U. S. 78, 79, 53 L. Ed. 97, 106, 29 S. Ct. 14 (Nov., 1908).

If a state statute, fair and impartial on its face is administered "by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yick Wo v. Hopkins, 118 U. S. 356, 373-374, 30 L. Ed. 220, 227, 6 S. Ct. 1064 (May, 1886).

STATE STATUTE ENLARGED AND SUPPLEMENTED SO AS TO IMPAIR OBLIGATIONS OF CONTRACT

The Supreme Court of the State of Montana has injected matters into the legislation of Congress and of the Montana Legislature entirely beyond the wording of the statutes. In doing so it has ignored all of the limitations on the judiciary.

Western Union Teleg. Co. v. Lenroot, 323 U. S. 490, 506, 89 L. Ed. 414, 425, 65 S. Ct. 335 (Jan., 1945).

Commissioner of Int. Rev. v. Beck's Estate et al, 129 F. (2d) 243 (2nd C. C. A., June, 1942).

In effect, the Montana Court has encroached upon the function of the legislative branch of government, and has impaired the sanctity of petitioner's contracts with the State of Montana bringing about a construction never before contemplated by the parties nor the legislative bodies.

Douglass v. Pike County, 101 U. S. 677, 687, 25 L. Ed. 968, 971 (Mar., 1880).

CONCLUSION

For the reasons stated, your petitioner respectfully prays that a Writ of Certiorari issue to enable this Court to review the judgment of the Supreme Court of the State of Montana.

Respectfully submitted,

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Counsel for Petitioner
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SUMNER B. YOUNG
L. V. HARRIS
Of Counsel for Petitioner

APPENDIX "A"
TO PETITION FOR WRIT OF CERTIORARI

TITLE 43, U. S. C. A.

CHAPTER 14.—GRANTS OF DESERT LANDS TO STATES FOR RECLAMATION (THE CAREY ACT).

"Section 641. Grant of desert land to States authorized. To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is, as of August 18, 1894, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined in section 322 of Chapter 9 of this title, to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed or* occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the said** desert-land law, chapter 9 of this title, within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if actual construction of reclamation works is not begun within three years after the segregation of the lands or within such further period not exceeding three years, as shall be allowed by the Secretary of the Interior, the said Secretary of the Interior, in his discretion, may restore such lands to the public domain; and if the State

fails, within ten years from the date of such segregation, to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period not exceeding five years, or may, in his discretion, restore such lands not irrigated and reclaimed to the public domain upon the expiration of the ten-year period or of any extension thereof.

"Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved.

"Any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any

way whatever, except to secure their reclamation, cultivation and settlement.

"As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: Provided, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. (Aug. 18, 1894, c. 301, §4, 28 Stat. 422; *** Jan. 6, 1921, c. 10, 41 Stat. 1085.)

"* 'or' where indicated should be omitted as in the original text.

** 'said' should be omitted.

*** 'Mar. 3, 1901, c. 853, §3, 31 Stat. 1188;' should be inserted."

"§642. *Liens for expenses of reclamation.* Under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in the preceding section, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation until dis-

posed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: Provided, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part. (June 11, 1896, c. 420, §1, 29 Stat. 413.*)

"* '413' should read '434' "

APPENDIX "B"
TO PETITION FOR WRIT OF CERTIORARI

Section 1976, Revised Codes of Montana, 1935 (Section 81-2111, Revised Codes of Montana, 1947).

"Any person or company entering into a contract to construct canals or other irrigation works, and to sell water rights to settlers under this act, may maintain and operate the same until perpetual water rights appurtenant to ninety per cent. of the lands, to reclaim which such works were constructed, have been sold and paid for, when such works shall be turned over to the settlers and others owning rights to take water from such canals, who shall have the right thereafter to maintain and operate it. The contractor, so long as he maintains and operates the irrigation works, shall have the right to collect from settlers on such lands not to exceed one dollar per acre, per year, for each acre of land to which his or her water right is appurtenant, said charge to include the cost of maintenance, operation, and delivery of water to said land."

Section 1980, Revised Codes of Montana, 1935 (Section 81-2115, Revised Codes of Montana, 1947).

"*Applications to settle lands reclaimed.* Any citizen of the United States, or any person having declared his intention to become a citizen of the United States, over the age of twenty-one years, may make application, under oath, to the board, to enter any of said land at any time after the same has been classified, in any amount not to exceed one hundred and sixty acres for any one person; and such appli-

cation shall set forth that the person desiring to make such entry does so for the purpose of settlement in accordance with the act of Congress and the laws of this state relating thereto, and that the applicant has never received the benefit of the provisions of this act to an amount greater than one hundred and sixty acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company, or association who has been authorized by the board to furnish water for the reclamation of said lands; and if said applicant has at any previous time entered land under the provisions of this act, he shall so state in his application, together with description, date of entry, and location of said land. The board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications of entry shall be accompanied by a payment of twenty-five cents per acre, which shall be paid as partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for that purpose. If the application is not allowed, the twenty-five cents per acre accompanying it shall be returned to applicant; provided, that where the construction company fails to furnish water to any settler under the provisions of its contract with the state, the state shall refund to such settler all payments that he shall have made to the state."

Section 1983, Revised Codes of Montana, 1935 (Section 81-2118, Revised Codes of Montana, 1947).

"Water rights—foreclosure of lien for deferred payments. (1) The water rights to all lands acquired under the provisions of this act shall attach to and become appurtenant to the land as soon as title passes from the United States to the state. Any person, company, or association furnishing water for any tract of land shall have a first and prior lien on said water right and land upon which said water is used for all deferred payments for said water rights; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner or possessor of said lands. Upon default in any of the deferred payments secured by any lien under the provisions of this act, the person, company of persons, association, or incorporated company holding or owning said lien may foreclose the same in the same manner as mortgages of real property are foreclosed. All sales shall be advertised in a newspaper of general circulation, published in the county where said land or some part thereof is situate, for six consecutive weeks, and the same shall be sold to the highest bidder at the front door of the court-house of the county, or such place as may be agreed upon by the terms of the aforesaid contract. The sheriff of said county shall in all such cases give all notices of sale, and shall sell all such land and water rights, and shall make and execute a certificate of sale to the purchaser thereof, and at such sale no person, company of persons, association, or incorporated company owning and holding any lien shall bid in or purchase any land or water right at a greater price than the amount due on deferred payment for said water right and land, and the cost incurred in making the sale of said land and water right. At any time within twelve months

after the foreclosure sale by the sheriff of the land and water right as aforesaid, the original owner against whom the lien has been foreclosed may apply to the person, company of persons, association, or incorporated company purchasing at such sale, to redeem said land and water rights, and the purchaser shall assign the certificate of sale to such land and water rights to such original owner upon the payment by him within such twelve months of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest at ten per cent. per annum, costs, and charges thereon.

"(2) When the lien holder becomes the purchaser at such foreclosure sale, and such lands and water rights are not redeemed by the original owner within twelve months, then at any time within three months thereafter any person desiring to settle and use such lands and water rights may apply to the purchaser at such foreclosure sale to redeem such land and water rights, and such purchaser shall assign the certificate of sale of such land and water rights to the person desiring to redeem the same, upon the payment by him of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest, costs, and charges thereon.

"(3) Upon issuing any certificate of sale, it shall be the duty of the sheriff to file for record in the office of the county clerk of the county where such land is situated, a certified copy of such certificate of sale assigned to him by the purchaser as aforesaid, upon his redemption of such land and water rights. In case the land and water rights shall be redeemed by any person other than the original

owner, the sheriff shall, upon presentation of such certificate, issue a deed for such land and water rights to the person redeeming the same. If the land and water rights shall not be redeemed by any person within the time and in the manner hereinbefore provided, it shall be the duty of the sheriff, upon presentation of certificate of sale by the original purchaser to issue a deed to such purchaser.

"(4) Where such land and water rights are not purchased by the lien holder at such foreclosure sale, it shall be the duty of the sheriff to first pay the lien holder out of the proceeds of such sale the amount of the lien, together with all interest, costs, and charges thereon, and to pay any balance remaining to the person against whom such lien has been foreclosed, and for his services in such cases the sheriff shall receive the same fees as are provided by law in civil cases. Under no circumstances shall a lien be foreclosed against land belonging to the state and not filed on by an individual. In case the claimant whose rights to any such land and water shall have been divested by any deed issued, as in this section provided, shall not have paid to the state sums due or to become due to it on account of such land, any person desiring to settle upon the same shall acquire the right so to do upon payment to the grantee under such sheriff's deed of the amount which would have effected a redemption at the time, with ten per cent. additional; provided, that the holder under the deed shall have the right to remove any crops which may be growing upon such land at the time such intending settler offers to pay such sum."

Supreme Court of the United States

October Term, 1950

No._____

THE VALIER COMPANY, a Montana Corporation,

Petitioner,

vs.

THE STATE OF MONTANA, CAREY LAND ACT BOARD, comprised of Sam C. Ford, Governor; Sam W. Mitchell, Secretary of State; R. V. Bottomly, Attorney General; and PONDERA COUNTY CANAL AND RESERVOIR COMPANY, a Montana Corporation,

Respondents.

JOINDER BY RESPONDENT, THE STATE OF MONTANA, CAREY LAND ACT BOARD, COMPRISED OF SAM C. FORD, GOVERNOR; SAM W. MITCHELL, SECRETARY OF STATE; R. V. BOTTOMLY, ATTORNEY GENERAL, IN PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The State of Montana, Carey Land Act Board, comprised of Sam C. Ford, Governor; Sam W. Mitchell, Secretary of State; R. V. Bottomly, Attorney General, one of the respond-

ents upon this petition for Writ of Certiorari, by its counsel, hereby joins in petitioner's prayer that a writ of certiorari issue to review the decision of the Supreme Court of the State of Montana which was made final by the Order Denying Petition for Rehearing, entered in the above entitled cause March 29, 1950.

NATURE OF THE CASE

The nature of the case is described in petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of Montana and in the opinion of the majority of the Supreme Court of the State of Montana.

Respondent submits that the public interest suggests further review of the case by this Court.

SCOPE OF REVIEW SOUGHT

Respondent is desirous that, upon issuance of the Writ, the Court examine and review all of the issues in the case without limitation of the number or form of the issues specified by petitioner. Such plenary review is necessary in order that questions relating to the title to said Federal "Carey Act" lands be put at rest.

WHEREFORE, respondent joins in petitioner's prayer that a Writ of Certiorari issue as above set forth.

Dated this 10th day of July, 1950.

H. B. LANDOE,

Counsel for Respondent, State of Montana, Carey Land Act Board, et al.

Bozeman, Montana